INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	3
THE QUESTION IS SUBSTANTIAL	7
CONCLUSION	14
APPENDIX A—Opinion of Three-Judge District Court for the Western District of Washington	15
APPENDIX B—Statutes Involved	21

CASES CITED

American Trucking Assns. v. *United States*, 344 U. S. 298	2, 10
Determination of Exempted Agricultural Commodities, 52 M. C. C. 511	8, 11
East Texas Motor Freight Lines v. *Frozen Food Express*, 351 U. S. 49	2, 7, 8
Frozen Food Express v. *United States*, 351 U. S. 40	2, 11
Newton Extension of Operations—Frozen Foods, 43 M. C. C. 787	11

STATUTES CITED

Interstate Commerce Act:	
Section 203 (b) (6), 49 U. S. C. 303 (b) (6)	3, 4, 7, 9, 11
Section 204 (c), 49 U. S. C. 304 (c)	3
Section 206 (a), 49 U. S. C. 306 (a)	3, 4
28 U. S. C. 1253	2
28 U. S. C. 1336	2
28 U. S. C. 2101 (b)	2

MISCELLANEOUS

Freight Commodity Statistics, Class I Steam Railways in the United States, Interstate Commerce Commission	12
The Fruit Situation, June 22, 1956, U. S. Department of Agriculture, Agricultural Marketing Service	12
The Vegetable Situation, April 26, 1956, U. S. Department of Agriculture, Agricultural Marketing Service	12

397134—56——1

In the Supreme Court of the United States

OCTOBER TERM, 1956

No.

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

HOME TRANSFER & STORAGE CO., INC., APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

JURISDICTIONAL STATEMENT

The appellant, Interstate Commerce Commission (hereinafter "the Commission"), appeals from the judgment of the United States District Court for the Western District of Washington, entered on May 7, 1956, setting aside and enjoining enforcement of an order of the Commission, and submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the three-judge district court for the Western District of Washington, filed May 7, 1956, is reported at 141 F. Supp. 599. A copy of the opin-

ion is set forth in Appendix A hereto. The last paragraph of the opinion contains the judgment of the court that the considered order "is set aside and the case is remanded to the Interstate Commerce Commission with instructions that the Commission should take such action as to it shall seem proper and in accord with this opinion".

The Commission's report which gave rise to the order set aside by the district court was entered in a proceeding entitled No. MC–C–1562, *Home Transfer & Storage Co., Investigation of Operations,* and is printed at 63 M. C. C. 785.

JURISDICTION

This suit was brought under 28 U. S. C. 1336 to set aside and enjoin enforcement of the Commission's final order in the above-mentioned proceeding. The judgment of the district court was entered on May 7, 1956, and the Commission's notice of appeal was filed in the district court on July 5, 1956.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b), and is sustained by the following cases: *American Trucking Assns.* v. *United States,* 344 U. S. 298; *Frozen Food Express* v. *United States,* 351 U. S. 40; *East Texas Motor Freight Lines* v. *Frozen Food Express,* 351 U. S. 49.

QUESTION PRESENTED

Whether frozen fruits and frozen vegetables of the several types involved in this case are "agricultural commodities" and not "manufactured products there-

of" within the meaning of section 203 (b) (6) of the Interstate Commerce Act, 49 U. S. C. 303 (b) (6).

STATUTES INVOLVED

Sections 203 (b) (6), 204 (c), and 206 (a) of the Interstate Commerce Act, 49 U. S. C. 303 (b) (6), 304 (c), and 306 (a), are set forth in Appendix B hereto.

STATEMENT

In 1953, the Commission, acting pursuant to section 204 (c) of the Interstate Commerce Act, instituted an investigation proceeding to determine whether Home Transfer & Storage Co., Inc., a common carrier by motor vehicle, was engaged in the for-hire transportation of commodities (frozen fruits and frozen vegetables) not within the scope of its operating authority, in violation of section 206 (a) of the Act. A hearing was thereafter held before a joint board, at which evidence was offered by the Commssion's Bureau of Inquiry and Compliance, by the respondent (Home Transfer), and by several motor carrier intervenors. The latter supported the contention that the respondent was engaged in unauthorized operations. At the hearing, it was stipulated that Home Transfer was engaged in the for-hire transportation in interstate commerce of frozen fruits and vegetables, including frozen french-fried potatoes and frozen juices. In a report subsequently filed, the joint board recommended that the Commission find that the described operations were in violation and that a cease and desist order be issued.

Upon consideration of the record and of exceptions to the report recommended by the joint board, the Commission, by Division 5, issued its report, dated June 30, 1955, 63 M. C. C. 785, finding that "without proper authority respondent has been transporting frozen foods, more specifically frozen fruits, vegetables, and juices between points in Washington and points in California" (p. 787). The Commission thereupon issued an order requiring Home Transfer to cease and desist from the operations found to be unauthorized and in violation of section 206 (a) of the Act.

Home Transfer's petition for reconsideration was denied on December 14, 1955, and shortly thereafter it filed this suit to set aside and enjoin enforcement of the cease-and-desist order.

Home Transfer contended before the three-judge district court, as it had in the Commission proceeding, that the considered commodities are exempt from the certificate and rate provisions of the Act; that is, that they are "agricultural commodities" and not "manufactured products thereof" within the meaning of those terms as used in section 203 (b) (6). The United States and the Commission, as defendants, and all of the intervenors, contended that the considered articles are not agricultural commodities and that they are manufactured products and therefore not within the statutory exemption.

The opinion of the district court described the principal commodities and their treatments in the following language:

> At the hearing before Joint Board No. 5 the following fresh fruits and vegetables were listed among those subject to the quick freeze processing here in question: Fruits: Raspberries, strawberries, and peaches. Vegetables: Garden peas, cauliflower, asparagus, spinach, broccoli, corn, green beans, brussels sprouts, butter beans, rhubarb and carrots.
>
> Generally speaking, the quick freeze processing here contended by defendants to create nonexempt "manufactured products" is as follows: To all fruits are added sugars and sirups, and to only peaches ascorbic acid also is added. Vegetables are washed, then blanched by heating them to temperatures high enough to kill the enzymes and then reduced to near zero temperature and uniformly kept that way. Stalky vegetables are sometimes split and less frequently a core is removed to facilitate blanching. Rhubarb is the only vegetable not so blanched, but to it sugar is added. The requirement of uniform maintenance of near zero temperature after the quick freeze processing applies to all fruits and vegetables.

The changes made in the fresh, raw fruits and vegetables to convert them into "frozen fruits and vegetables" are described in greater detail in the evidence offered at the joint board hearing, which is summar-

ized in the Commission's report as follows (63 M. C. C. at 789–790):

> There was considerable testimony bearing on the processing of fresh fruits and vegetables at the plant located in Mount Vernon. The processing of fresh peas is typical of the quick freezing of vegetables, although individual steps in the process or the order in which they occur depend upon the kind of vegetable to be frozen. The peas are removed from the pods at a "viner" located near the harvest area. They are then transported to the plant where they are put through dry mills to remove debris and through water washers. The peas then are subjected to a "blanching" process by which quick heat is applied for the purpose of inactivating the enzymatic system of the vegetable. If the enzymes are permitted to remain active, the vegetable will spoil even in cold storage. Thereafter, the peas go through quality separators, over inspection belts, thence onto freezing belts where they are loose frozen by blasts of cold air. They are then packaged, cased, and placed in a cold warehouse. Typical of the fruits are raspberries which are washed and put into packages. Sirup is added, the package is closed, and the entire unit is frozen. In addition to providing sweetening, the sirup also acts as an antioxident in maintaining the color of the fruit. Once frozen, the fruits and vegetables must be kept at temperatures near zero. While temperatures as high as 15° F. may not be harmful, it is important that variations in temperature be avoided to protect against deterioration in quality.

The decision of the district court that frozen fruits and vegetables are manufactured agricultural commodities appears to have turned largely upon the majority opinion of this Court in *East Texas Motor Freight Lines* v. *Frozen Food Express,* 351 U. S. 49, decided April 23, 1956, in which it was held that fresh and frozen dressed poultry was an agricultural commodity, not a manufactured product thereof.

THE QUESTION IS SUBSTANTIAL

In *East Texas Motor Freight Lines* v. *Frozen Food Express, supra,* this Court held, with Justices Burton, Frankfurter, Minton and Harlan dissenting, that fresh and frozen dressed poultry are exempt agricultural commodities within the meaning of Section 203 (b) (6) of the Interstate Commerce Act, which exempts from economic (but not from safety) regulation "motor vehicles used in carrying property consisting of * * * agricultural (including horticultural commodities (not including manufactured products thereof) * * *." In the instant case, the court below concluded that this Court's decision required it to hold that frozen fruits and vegetables were exempt agricultural commodities under Section 203 (b) (6). In so holding, we submit that the court below erred in applying Section 203 (b) (6) as interpreted by this Court. Because frozen fruits and vegetables are transported in large volume, the question as to whether they are exempt agricultural commodities is of substantial importance in the administration of the Interstate Commerce Act and to the transportation industry.

1. In the *East Texas* case, *supra,* this Court concluded that agricultural commodities "in their raw state or after they have become marketable by incidental processing" (351 U. S., at 51) are within the exemption from economic regulation provided by Section 203 (b) (6). Noting from the legislative history that Congress did not intend that milk should lose this exemption by pasteurization, or cotton by ginning, the Court stated that

> At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been "manufactured" within the meaning of § 203 (b) (6).[1]

Dressed poultry, which was held to be an exempt commodity by this Court in the *East Texas* case, is the result of processing which consists of killing and dressing. But no chemical or other foreign element is added to poultry in the process of converting live poultry into dressed poultry. Nor is it cooked, even partially, before being readied for marketing.

The frozen fruits and vegetables involved in the instant case[2] are the result of entirely different treat-

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[1] In *Determination of Exempted Agricultural Commodities,* 52 M. C. C. 511, 521, the Commission similarly concluded that the exemption of Section 203 (b) (6) includes "agricultural commodities in their natural state and those which, as a result of treating or processing, have not acquired new forms, qualities, properties, or combinations."

[2] This case involved food products which for convenience of description are grouped into two categories—frozen fruits and frozen vegetables. However, many more than two vegetables

ment. After the fruits are sliced or cut up, but before they are frozen, sugar and sirup are added to each of them to provide sweetening and (as to some fruit) to maintain the natural color. To peaches only, ascorbic acid also is added. After washing, the vegetables are blanched by heating them to temperatures high enough to kill the enzymes (thereby preventing spoilage), "loose frozen by cold blasts of air," and packaged and placed in cold storage. Both fruits and vegetables must be kept at nearly zero temperatures after quick freezing.[3]

We contend that the treatment given to fresh fruits and vegetables to convert them into frozen fruits and vegetables changes them from agricultural products to "manufactured products thereof" within the meaning of Section 203 (b) (6). In contrast with the purely mechanical killing and dressing of poultry, we submit that the addition of chemicals to fruit and the partial cooking of vegetables before freezing, involves more than "incidental processing" and that processing and manufacturing have merged to create products different in quality and form.

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are involved. The district court's opinion mentions three fruits, viz raspberries, strawberries, and peaches; and eleven vegetables, viz garden peas, cauliflower, asparagus, spinach, broccoli, corn, green beans, brussels sprouts, butter beans, rhubarb, and carrots. A total of 58 vegetables and 25 fruits are covered by the Commission's decision in *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511.

[3] The resulting frozen fruits and vegetables are prepared and distributed by large commercial establishments, and transported in large volume by rail and by motor carriers.

We contend that the court below erred in holding that frozen fruits and vegetables are exempt agricultural commodities on the ground that, apart from the treatments summarized above, "these processed fruits and vegetables remain essentially in the same shape and form as non-processed fruits and vegetables." The heart of the district court's error was in applying this Court's views in the *East Texas* case as a literal dictionary definition, rather than as one to be applied in the light of the purposes of Part II of the Interstate Commerce Act. This Court has recognized that the purpose of Congress in enacting the Motor Carrier Act of 1935 (now Part II of the Interstate Commerce Act) was to make possible a system of healthy common and contract motor carriers to serve the entire public. That purpose and the conditions which Congress sought to eliminate were epitomized by this Court in *American Trucking Association, Inc.* v. *United States,* 344 U. S. 298, 312 as follows:

> * * * Then as now the industry was unstable economically, dominated by ease of competitive entry and a fluid rate picture. And as a result, it became overcrowded with small economic units which proved unable to satisfy even the most minimal standards of safety or financial responsibility.

And the Court has held that all of the provisions of the Act must be interpreted so far as possible to further this legislative purpose.

We do not urge a mechanical rule of strict construction of exemptions from general regulatory statutes. Rather, we urge that the exemption of Section 203 (b) (6), as construed by this Court, be applied in

the light of the fact that every determination that a commodity is exempt permits unrestricted entry into the transportation of such commodity and unrestrained rate competition. Such erosion of the position of public carriers, carried far enough, will impair their ability to provide all shippers with reasonable service at reasonable rates.

Since 1935, the Commission has consistently held that frozen fruits and vegetables were not exempt agricultural commodities. *Newton Extension of Operations—Frozen Foods,* 43 M. C. C. 787 (1944); *Determination of Exempted Agricultural Commodities,* 52 M. C. C. 511, 534 (1951). The decision below is the only court decision holding to the contrary, although the same issue has been raised in *Frozen Food Express* v. *United States,* 351 U. S. 40, and presumably will be determined upon the remand of that case to the district court. It is also significant that prior to this Court's decision in the *East Texas* case, the Department of Justice, which (with the Department of Agriculture) had contended that dressed poultry was exempt, simultaneously supported the Commission's position in both the instant case in the court below and in the *Frozen Food Express* case that frozen fruits and vegetables were not exempt.

2. The substantial nature of the question presented is also shown by the figures as to the total volume of frozen fruits and vegetables now being transported in the United States, and by the figures as to the amounts invested by authorized motor carriers in vehicular equipment especially designed to transport frozen

products. This traffic is in no sense a mere segment of the transportation industry. It has grown to such an extent in the past three or four years that it has become almost an industry within itself. Statistics compiled by the Department of Agriculture and contained in official publications show that 328,894 tons of frozen fruits [4] and 569,848 tons of frozen vegetables [5] were produced in 1955. Of these, 161,168 tons of frozen fruits and 329,000 tons of frozen vegetables were carried by railroads,[6] and 2 tons of frozen fruits and 3 tons of frozen vegetables were transported by water carriers.[7]

Presumably, the remainder of the total production of frozen fruits and vegetables (more than 400,000 tons) moved by truck. Even though figures are not available to show the exact volume of such traffic transported by regulated motor carriers, as contrasted with unregulated for-hire carriers and private carriers, the above tonnages are sufficient to demonstrate that traffic in these products has reached enormous proportions.

Paralleling the tremendous increase in the volume of this traffic has been the growth in that part of the motor carrier industry devoted to the transportation of frozen foods and authorized by the Commission to engage in such operations. Annual reports filed with

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[4] *The Fruit Situation* (6/22/56), U. S. Department of Agriculture, Agricultural Marketing Service, p. 30.

[5] *The Vegetable Situation* (4/26/56), U. S. Department of Agriculture, Agricultural Marketing Service, p. 25.

[6] *Freight Commodity Statistics, Class I Steam Railway in the United States*, Interstate Commerce Commission, p. 7.

[7] Estimates based on 1953 and 1954 data.

the Commission for the year 1955 by 60 Class I motor carriers[8] engaged solely in transporting refrigerated solid products ("solid" as distinguished from liquid products such as milk) show that their 1955 gross revenues from interstate operations aggregated $60,320,059; that they owned 2,477 pieces of equipment (vehicles), which cost $16,187,193; and that their total assets (including equipment) were valued at $19,019,156. These 60 carriers operated an additional 1,514 vehicles leased by them from owner-drivers, making a total of 3,991 vehicles used by them in such transportation.

During the same year there were 372 other Class I motor carriers engaged in transporting refrigerated solid products along with other commodities. They owned 5,377 pieces of refrigerated equipment, plus an estimated 1,800 tractors, or a total of 7,177 vehicles used in transporting such refrigerated products. Assuming the cost of these vehicles would average the same as that of the vehicles owned by the 60 carriers referred to above, the cost of the 7,177 vehicles would be approximately 48 million dollars, and the total investment in such vehicles by both groups of carriers would be at least $64,000,000.

The annual reports of the 432 motor carriers engaged in transporting such refrigerated products show that their 1955 revenues from such operations aggregated $240,000,000, that is, nearly a quarter-billion dollars.

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[8] Class I motor carriers are those having gross annual revenues of $200,000 or more from transportation services.

If motor carriage of frozen fruits and vegetables is to be exempted, with consequent rate cutting and unrestrained competition by unregulated truckers, it is reasonable to assume that rail carriers, as well as presently-regulated motor carriers, will lose much of this traffic to "exempt" motor carriers. Large investments in equipment have been made upon the assumption that the transportation of frozen fruits and vegetables is subject to the certificate and rate provisions of the Act. The decision below not only imperils these investments but also portends a continuing erosion of the traffic which has been handled by all public transportation agencies. Public transportation cannot survive on a diminishing volume of traffic without seriously affecting the Nation's economy through considerable increases in freight rates on the remaining traffic or a deterioration of service and equipment through the weakening of public carriers.

CONCLUSION

For the reasons stated, we believe that the question presented by this appeal is so substantial and is of such public importance as to require plenary consideration, with briefs and oral argument, for its resolution.

Respectfully submitted.

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AUGUST 31, 1956.

APPENDIX A

In the District Court of the United States for the Western District of Washington, Northern Division at Bellingham

No. 159

HOME TRANSFER & STORAGE CO., PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

CONSOLIDATED FREIGHTWAYS, INC., ET AL., AND EXLEY PRODUCE EXPRESS, INC., INTERVENORS

COURT'S DECISION

In this action plaintiff Home Transfer & Storage Co., a corporation, asks this statutory 3-Judge Court (28 U. S. C. § 2325) to enjoin, set aside, cancel and annul an order of the Interstate Commerce Commission requiring plaintiff to cease and desist from the transportation of frozen fruits and frozen vegetables between points in Washington and California.

The complained of order was issued by the Interstate Commerce Commission in its Cause No. MCC-1562 entitled Home Transfer & Storage Co., Inc.—Investigation of Operation, wherein the Commission investigated plaintiff's operations pursuant to the Commission's authority under Sections 204 (c) and 212 (a) of the Interstate Commerce Act. That in-

vestigation matter was assigned for hearing before a Joint Board composed of representatives of the States of Washington and Oregon.

Both the Joint Board which heard the matter and Division Five of the Commission which reviewed it found that the plaintiff's operations in the transportation of frozen fruits and frozen vegetables between points in Washington and California violated the Motor Carriers Act (49 U. S. C. § 301 et seq.) because between those points plaintiff without authority transported for hire frozen fruits and frozen vegetables. Plaintiff, however, before the Commission contended and now contends that, as to Commission regulation of certificates and rates, those products are exempt as agricultural commodities as provided by 49 U. S. C. § 303 (b) (6), which in pertinent part provides as follows:

> Nothing in this chapter * * * shall be construed to include * * *.
>
> (6) motor vehicles used in carrying property consisting of ordinary livestock, fish, (including shell fish) or *agricultural* (including horticultural) *commodities, (not including manufactured products thereof)*, * * * [Italics supplied.]

The defendants United States of America and the Commission contend that frozen fruits and frozen vegetables are not agricultural commodities, but are non-exempt manufactured products thereof within the meaning of said Section 303 (b) (6). The intervenors support such defendants' contention.

At the hearing before Joint Board No. 5 the following fresh fruits and vegetables were listed among

those subject to the quick freeze processing here in question: Fruits: Raspberries, strawberries, and peaches. Vegetables: Garden peas, cauliflower, asparagus, spinach, broccoli, corn, green beans, brussels sprouts, butter beans, rhubarb and carrots.

Generally speaking, the quick freeze processing here contended by defendants to create non-exempt "manufactured products" is as follows: To all fruits are added sugars and sirups, and to only peaches ascorbic acid also is added. Vegetables are washed, then blanched by heating them to temperatures high enough to kill the enzymes and then reduced to near zero temperature and uniformly kept that way. Stalky vegetables are sometimes split and less frequently a core is removed to facilitate blanching. Rhubarb is the only vegetable not so blanched, but to it sugar is added. The requirement of uniform maintenance of near zero temperature after the quick freeze processing applies to all fruits and vegetables.

The sole remaining question for decision in this case, therefore, is: Are frozen fruits and frozen vegetables agricultural commodities or manufactured products thereof?

Up to the present time no judicial decision directly deciding that specific question has been cited by counsel in this case, nor is the Court advised of any such decision. So far as we know, this case marks the first time a Court has been asked to determine such specific question.

We here mention some previous cases which although not involving ordinary farm fruits and vege-

tables are helpful in our determining whether the processing in this case converted agricultural commodities into "manufactured products thereof".

In *Rieck-McJunkin Dairy Co.* v. *School District,* 66 A. (2d) 295 (Pa., 1949), and in *Louisville* v. *Ewing Von-Allmen Dairy Co.,* 105 S. W. (2d) 801 (Ky., 1937), it was held that the pasteurization of milk by subjecting it to a high, bacteria killing temperature and subsequently to chilling temperature did not change the nature of milk and that it remained milk despite pasteurization which was not manufacturing.

In *Union Truck Terminal, Inc.* v. *Perlstein,* 52 So. (2d) 315, it was held that the peeling and grating of, and adding sugar and acid to, bananas, and quick freezing them and storing them in cans in order to prevent them from perishing did not constitute "manufacturing", since the grated product of bananas was still bananas.

Counsel have furnished us with advance copies of, and with their approval we have since oral argument awaited, the decision of the case of *East Texas Motor Freight Lines, Inc. et al.* v. *Frozen Foods Express et al.,* which was the latest Supreme Court decision involving exemptions of agricultural commodities (not manufactured products thereof) under the provisions of 49 U. S. C. § 303 (b) (6), (Sec. 203 of Part II, I. C. Act, Motor Carriers). There by a 5–4 decision April 23, 1956, as yet unreported, that Court held that fresh and frozen dressed poultry is not a "manufactured product" within the meaning of 49 U. S. C. § 303 (b) (6).

In that case in its third paragraph, the Court majority said:

> The exemption of motor vehicles carrying "agricultural (including horticultural) commodities (not including manufactured products thereof)" was designed to preserve for the farmers the advantage of low-cost motor transportation. * * *. The victory in the Congress for the exemption was recognition that the price which a farmer obtains for his products is greatly affected by the cost of transporting them to the consuming market in their raw state or after they have become marketable by incidental processing.

In the fifth paragraph of that decision, the Court majority said:

> It is plain from this change (made in the wording of the Bill by House floor amendment) that the exemption of "agricultural commodities" was considerably broadened by making clear that the exemption was lost not by incidental or preliminary processing, but by manufacturing. * * *. The ginned and baled cotton and the cottonseed (admittedly not a manufactured product), as well as the dressed chicken, have gone through a processing stage. But neither has been "manufactured" in the normal sense of the word. * * *.

In the eighth and ninth (last two) paragraphs of that decision, the Court (majority opinion) said:

> At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been "manufactured" within the meaning of § 203 (b) (6).

> The Commission is the expert in the field of transportation. And its judgment is entitled to great deference because of its familiarity with the conditions in the industry which it regulates (citing). * * * But Congress has placed limits on its statutory powers; and our duty on judicial review is to determine those limits (citing). * * * Those limits would be passed here if the Commission were permitted to expand "manufactured" to include such incidental processing as is involved in dressing and freezing a chicken.

Although that Supreme Court decision of April 23, 1956 containing the above quoted statements did not involve frozen fruits and vegetables, as does this one, we think, in the absence of other Supreme Court action controllings ours, that the quoted statements of that Court in that case inescapably apply and guide us to similar conclusions on the facts of this case and to our decision against the validity of the Commission's order under attack here.

The processing of fresh fruits for quick freezing in this case is essentially nothing but adding sugars, sirups, and as to peaches ascorbic acid, to better preserve the fruits and improve their color and taste. Nothing but slicing of the fruit affects its physical form. The processing of fresh vegetables for quick freezing is to heat them, in some instances after first splitting them to hasten heat action, sufficiently to kill the enzymes, and then to follow with the desired degree of freezing. Although this process may produce noticeable discoloration, or may divide a stalky variety into two or more parts, nothing is done to otherwise change the form of the vegetables. In other

respects than those mentioned, these processed fruits and vegetables remain essentially in the same shape and form as non-processed fruits and vegetables.

Such results of the processing here make applicable to the facts of this case the above quoted Supreme Court statement in its April 23, 1956 decision that:

> But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been "manufactured" within the meaning of § 203 (b) (6).

The order of the Commission as to frozen fresh fruits and frozen fresh vegetables should, therefore, not stand. Said order insofar as it limits plaintiff's right to transport for hire frozen fresh fruits and frozen fresh vegetables is set aside and the case is remanded to the Interstate Commerce Commission with instructions that the Commission should take such action as to it shall seem proper and in accord with this opinion.

HOMER T. BONE,
United States Circuit Judge.
JOHN C. BOWEN,
United States District Judge.
WILLIAM J. LINDBERG,
United States District Judge.

APPENDIX B

Statutes Involved

Interstate Commerce Act, 49 U. S. C. 1, et seq.

Section 203 (b) (6), 49 U. S. C. 303 (b) (6): Nothing in this part, except the provisions of section 204 relative to qualifications and maxi-

mum hours of service of employees and safety of operation or standards of equipment, shall be construed to include * * * (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), *agricultural* (including horticultural) *commodities (not including manufactured products thereof)*, if such motor vehicles are not used in carrying any other property, or passengers, for compensation * * *. [Emphasis added.]

Section 204 (c), 49 U. S. C. 304 (c): Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

Section 206 (a), 49 U. S. C. 306 (a). * * * no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: * * *.

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IN THE

Supreme Court of the United States

October Term, 1956

No. 365

INTERSTATE COMMERCE COMMISSION,
Appellant

v.

HOME TRANSFER & STORAGE CO., INC.,
Appellee

On Appeal from the United States District Court for the Western District of Washington

AMICUS CURIAE BRIEF OF THE RAILROADS IN SUPPORT OF THE APPELLANT INTERSTATE COMMERCE COMMISSION'S JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS OF BRIEF.

	Page
I. Introductory Statement	1
II. The Interest of the Railroads	2
III. The Substantiality of the Issue	5
A. The Issue Is One of Substantial and Far Reaching Economic Impact	5
B. The Issue in Addition to Being One Having Substantial Economic Impact Is Also One of the Greatest Legal Importance in Providing the Precedent to Be Followed in Interpreting Section 203(b)(6) of the Interstate Commerce Act	7
V. Conclusion	10
Certificate of Service	11
Appendix "A"—List of Class I Railroads	12

TABLE OF CASES CITED.

	Page
Anheuser Busch Ass'n v. United States, 207 U. S. 556 (1908)	8
Determination of Exempted Agricultural Commodities, 52 M. C. C. 511 (1951)	4, 8, 9
East Texas Lines v. Frozen Food Express, 351 U. S. 49, 76 S. Ct. 574 (1956)	2, 3, 7, 8, 9
Frozen Food Express v. United States, 351 U. S. 40, 76 S. Ct. 569 (1956)	4, 9
Frozen Food Express v. United States, C. A. No. 8285, S. D. Texas, Houston Division	3, 4
Frozen Food Express v. United States, 128 F. Supp. 374 (S. D. Texas 1956)	3
Fruit Growers v. Brogdex Co., 283 U. S. 1 (1930)	7, 8
Hartranft v. Wiegmann, 121 U. S. 609 (1887)	8
I. C. C. v. Allen E. Kroblin, 113 F. Supp. 599 (N. D. Iowa 1953)	3, 8
I. C. C. v. Yeary Transfer Co., 104 F. Supp. 245 (E. D. Ky. 1952), aff'd 202 F. 2d 151 (6th Cir. 1953)	3, 8

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
Hearings on H. R. 5262, 74th Cong., 1st Sess., p. 27	6
Hearings on S. 1629, 74th Cong., 1st Sess., pp. 51, 78	6
Interstate Commerce Act, Part I, 49 U. S. C. 1 et seq.	2
Interstate Commerce Act, Part II, 49 U. S. C., 301 et seq.	2
Interstate Commerce Act, Section 203(b)(6)	3, 4, 5, 7, 9, 10

IN THE

Supreme Court of the United States

October Term, 1956

No.

INTERSTATE COMMERCE COMMISSION,
Appellant

v.

HOME TRANSFER & STORAGE CO., INC.,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

AMICUS CURIAE BRIEF OF THE RAILROADS IN SUPPORT OF THE APPELLANT INTERSTATE COMMERCE COMMISSION'S JURISDICTIONAL STATEMENT

I

INTRODUCTORY STATEMENT

This amicus curiae brief, in support of the Appellant, Interstate Commerce Commission's Jurisdictional Statement is submitted on behalf of virtually all of this nation's class I railroads, a list of which is attached hereto, made a part hereof, and marked Appendix A. Whenever the term Railroads is used, it should be understood to include all of the railroads listed in Appendix A. These Railroads are in complete agreement that the materials submitted in the Jurisdictional Statement of the Interstate Commerce Commission, hereinafter sometimes referred to as the Commission, and to avoid repetition and in conformity with Rule 42, will not restate such materials. Rather, these Railroads will submit as briefly and concisely as possible, additional reasons why they urge this Court to note probable jurisdiction of this case, and to list it for oral argument.

II

THE INTEREST OF THE RAILROADS

These Railroads are engaged in extensive operations throughout the United States in transporting for-hire under the complete scheme of regulation encompassed in Part I of the Interstate Commerce Act, 49 U. S. C. 1 et seq. (sometimes referred to hereafter as the Act), the precise commodities, namely frozen fresh fruits and frozen fresh vegetables, which the Court below held could be transported by for-hire motor carriers operating over the nation's highways completely outside and beyond the Commission's economic regulatory powers established by Part II of the Interstate Commerce Act, 49 U. S. C., 301 et seq. The effect of this decision of the Court below, when considered along with the powers of the Commission created by Part I of the Act, is that frozen fresh fruits and frozen fresh vegetables when moving by highway carriers are outside of regulation, but when moving by railroad are subject to complete regulation. The obvious inequality and inequity of such a situation leaves no doubt as to the interest of the Railroads in the outcome of this proceeding especially when it is kept in mind that the Railroads and the highway carriers are in intense and vigorous competition for this traffic which every day is becoming increasingly important. That any industry should have the greatest concern in litigation that would free its most important competitors from the shackles of regulation, while in no way removing the restraints under which it alone must operate, is so glaringly clear as to leave little basis for comment.

But there are other reasons aside from this paramount one why the Railroads are interested, and have a real stake, in the outcome of this litigation, which upon first impression are not obvious, but which, upon careful analysis, are only slightly less important.

The decision of the Court below purports to be largely based upon the opinion of this Court in *East Texas Lines*

v. Frozen Food Express, 351 U. S. 49, 76 S. Ct. 574 (1956) in which this Court held that fresh and frozen dressed poultry were covered by the exemption contained in Section 203(b)(6) of the Interstate Commerce Act. Since the commodities here involved, namely frozen fresh fruits and frozen fresh vegetables, require additional processing not necessary in the case of fresh and frozen dressed poultry, the question is raised whether the holding in the *East Texas Lines* case, should be extended thus widening the area of exempt transportation over the highways. This is a matter of the greatest concern and interest to these Railroads because experience has demonstrated beyond all question, that where the area of exempt transportation has been extended, it has resulted in a vast loss of railroad traffic to competitors operating without the burdens and restraints imposed by regulation. Furthermore, the pattern of court decisions in recent years has been very definitely one of erosion by the progressive inclusion of additional commodities in the exempt classification.[1] This pattern of judicial decisions, which in this instance has had a substantial effect upon the business of the Railroads, is of the greatest of interest to them for it is determinative of the desirability of seeking amendments to Section 203(b)(6) of the Act which will result in either a clearer expression of, or a change in, the policy of Congress.

The Railroads also have an interest in the instant litigation by reason of their being parties in litigation now pending before a three judge federal court sitting in the southern district of Texas, Houston Division, in which the precise question here involved will be litigated as a part of a broader court review concerned with the status of a large number of processed agricultural products. *Frozen Food Express v. United States,* C. A. No. 8285, S. D. Texas,

1. *E.g. Frozen Food Express v. United States,* 128 F. Supp. 374 (S. D. Texas 1956); *I.C.C. v. Allen E. Kroblin,* 113 F. Supp. 599 (N. D. Iowa 1953); *I.C.C. v. Yeary Transfer Co.,* 104 F. Supp. 245 (E. D. Ky. 1952), aff'd 202 F. 2d 151 (6th Cir. 1953).

Houston Division. There, the three judge court, by an order of this Court in, *Frozen Food Express v. United States,* 351 U. S. 40, 76 S. Ct., 569 (1956) will review the order of the Interstate Commerce Commission promulgated in *Determination of Exempted Agricultural Commodities,* 52 M. C. C. 511 (1951), an order which classified a large number of processed agricultural commodities as being either exempt or non-exempt. Included in the commodities embraced in the Commission's order are frozen fresh fruits and frozen fresh vegetables.

It is the belief of these Railroads that judicial consideration of the exemption contained in Section 203(b)(6) of the Act upon a fragmentary commodity-by-commodity basis cannot lead to anything but confusion, uncertainty, and widespread economic disturbances, and that, therefore, if any sensible and consistent pattern for the interpretation of this most difficult legislation provision is to evolve, it must come from a court review of the only comprehensive treatment ever given to the problem, namely that of the Commission in the *Determination* case. There, unlike the instant situation, where only a segment of the controversial commodities are involved, the problem is considered in its entirety. The Railroads being participants in the proceeding before the three judge federal court sitting in Houston, Texas wherein the *Determination* case will be reviewed at an argument now scheduled for September 13, 1956, have by reason of such participation an important interest in the instant proceedings before this Court, for any action here taken although based on a fragment of the entire picture may very well predetermine what direction the court sitting in Houston should go in reviewing the *Determination* case. In summary, the Railroads have a very large interest in the instant proceedings, for not only does the outcome here place an important segment of their traffic in jeopardy, but in addition, action taken by this Court may well have conclusive effects upon other litigation in which these Railroads have a significant stake.

III

THE SUBSTANTIALITY OF THE ISSUE

A. The Issue Is One of Substantial and Far Reaching Economic Impact

The issue presented by this appeal can be simply and easily stated, for it involves the single question of whether frozen fresh fruits and frozen fresh vegetables are covered by, or outside of, the exemption contained in Section 203(b)(6) of the Interstate Commerce Act. But so delimiting the issue does not mean that it is one of easy solution, or of little importance. As is often the case with simply stated problems, the solution is hard to come by and when reached, of great economic consequence. This is particularly true in this instance.

Were the consideration by this Court of the status of frozen fresh fruits and frozen fresh vegetables at a time when the statutory provision involved had become law, the determination that such items were in either the exempt or the non-exempt classification would have a considerably less economic impact than such determination will have today. The reason for this is, that since Section 203(b)(6) of the Act became law in 1935, the transportation of frozen fresh fruits and frozen fresh vegetables has become a very large and growing industrial activity. And most significantly, this activity has been carried on by both the Railroads and the for-hire motor carrier industry within the framework of full economic regulation by the Commission. At no time has there been any appreciable movement of these commodities by for-hire carriers under a claim that such transportation is beyond the economic regulatory powers of the Commission, because the thinking has generally prevailed within the industry that this type of transportation is not covered by the exemption in Section 203(b)(6).

Motor carriers on the strength of Commission rulings that the transportation of these frozen commodities re-

quires certification have expanded vast sums securing the certificates and the expensive equipment needed to handle frozen fruits and vegetables. Within the protection of their certificates, these motor carriers have built up large fleets of trucks which has made available the highest quality service to the public. The Railroads, likewise protected from excessive motor carrier competition, have developed and built up large fleets of expensive equipment especially adapted to the handling of articles requiring low temperature refrigeration.[2]

If this Court sustains the opinion of the Court below, regulation of the for-hire motor carriers of these commodities will instantaneously be dissolved and the door opened to anyone to enter the field and provide whatever quantity and quality of service he desires to make available totally without regard for the needs, wants, and concerns of the public. The economic impact of this will not be limited to the certificated motor carriers and the Railroads, but will extend to the public dependant upon the non-discriminatory services provided by the regulated carriers at rates required by statute to be just and reasonable to all shippers. If it be thought that this is an overstatement of the severity of the impact of deregulating an industry which for over twenty years has been regarded as under regulation, a review of the Congressional hearings which prompted the legislation regulating the motor carrier industry generally should quickly dispel such thinking.[3]

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2. At the present time, the railroads have in service or authorized for construction, 40,403 cars suitable for handling frozen commodities of the type here involved. At conservative prices, such equipment has a current value of $512,459,000. This equipment is, of course, used for perishable traffic of types other than here involved, but nevertheless, during the year 1955 was used by the railroads to handle 858,168 tons of frozen fruits and frozen vegetables. It is significant that of the total pack of frozen foods, the railroads transported 32%.

3. See hearings on H. R. 5262, 74th Cong., 1st Sess., p. 27; Hearings on S. 1629, 74th Cong., 1st Sess., pp. 51, 78.

Summarily stated, the problem here, while seemingly involving only the classification of articles of commerce as being either exempt or non-exempt, when solved will determine whether an important American business activity which has flourished and prospered under regulation, should forthwith be deregulated. The severity of the economic impact that the determination of the legal issue will have, it is most respectfully submitted, necessitates the full consideration of it by this Court.

B. The Issue in Addition to Being One Having Substantial Economic Impact Is Also One of the Greatest Legal Importance in Providing the Precedent to be Followed in Interpreting Section 203(b)(6) of the Interstate Commerce Act

This Court in its recent decision in *East Texas Lines v. Frozen Food Express, supra,* dealing with the problem of distinguishing simple processing—which does not remove an agricultural commodity from its exempt status—from manufacturing—which converts the exempted agricultural product into a non-exempt manufactured item—laid down the following test: (76 S. Ct. 574, 577)

> "At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been 'manufactured' within the meaning of § 203(b)(6)."

An appropriate label for this recently pronounced test might be the "continuing substantial identity test." Research indicates that this is the first pronouncement by any court of this test. Previously where a test or definition has been used by the Commission and the courts to distinguish mere processed agricultural commodities from manufactured products thereof, in interpreting Section 203(b)(6), it has been the test pronounced by this Court in *Fruit*

Growers v. Brogdex Co., 283 U. S. 1 (1930).[4] Relying on a dictionary definition, Mr. Justice Reynolds, at page 11, defined manufacture as ". . . 'the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery'."

It is the belief of these Railroads that the "continuing substantial identity test" is simply the corollary of the test announced in the *Fruit Growers* case. If an agricultural commodity, although subjected to processing, retains a continuing substantial identity, it remains an agricultural commodity; and it is not until the processing results in its taking on "new forms, qualities, properties, or combinations" that it becomes a manufactured item. Support of this view is found in the fact that this Court in both the *Fruit Growers* case and the *East Texas Lines* case referred to its earlier opinions in *Hartranft v. Wiegmann*, 121 U. S. 609 (1887) and *Anheuser Busch Ass'n v. United States*, 207 U. S. 556 (1908) wherein manufacturing was found to exist when a "new and different article . . . [emerges] 'having a distinctive name, character or use'."

Whether the "continuing substantial identity test" is merely a restatement in corollary form of the earlier test used by this Court to distinguish mere processing from manufacture, or the pronouncement of a new test, is of the greatest importance and significance because of the pendency of court review of the *Determination* case by the three judge Court sitting in Houston, Texas. If this Court intended in the *East Texas Lines* case to prescribe a new and different test, then the review of the *Determination* case will be greatly extended because as indicated before, the Commission in that case applied the test earlier announced by this Court. If, however, as these Railroads believe, the

4. See *I.C.C. v. Yeary Transfer Co.*, 104 F. Supp. 245, 247 (E. D. Ky. 1952), aff'd 202 F. 2d 151 (6th Cir. 1953); *Determination of Exempted Agricultural Commodities*, 52 M.C.C. 511, 521 (1951); cf. *I.C.C. v. Allen E. Kroblin, Inc.*, 113 F. Supp. 599, 607 (N.D. Iowa 1953).

East Texas Lines case does not produce a new test, but merely restates the earlier test, the review of the *Determination* case will be greatly simplified, for in such instance, the Court's function will merely be one of ascertaining whether or not the test used by the Commission was correctly applied to the particular commodities involved. It is one thing to review for correctness a conclusion based on an admittedly sound formula, and quite different and considerably more difficult task to review a conclusion that is based upon a formula which is not the proper one.

These Railroads believe that the recognition by this Court that the interpretation of Section 203(b)(6) over the years has presented "difficult problems"[5] more than justifies another examination by this Court of the applicability of the tests above referred to in determining the status of frozen fresh fruits and frozen fresh vegetables so that all confusion and doubt will be removed.

While these Railroads believe that an examination by this Court of the decision below will result in its reversal—for it is most difficult for the ordinary person to think of frozen peaches or frozen strawberries as being the same as fresh peaches or fresh strawberries—that as much such result is desired, it is equally important they believe for the legal principles to be followed in interpreting Section 203(b)(6) be made unequivocal. Only if this is done, can regulated transportation—which includes the Railroads and the certificated motor carriers—plan future activities in this important field of the Nation's commerce. So long as there is doubt regarding the interpretation of Section 203(b)(6), long range plans for improved service can neither be considered or undertaken. This is an instance—not necessarily one without parallel, but certainly one in clear focus—where the firming-up of legal principles will make possible the orderly and practical development of important business activities in the Nation's transportation industry.

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5. See the dissenting opinion of Mr. Justice Harlan, *Frozen Food Express v. United States*, 351 U. S. 40, 76 S. Ct. 569, 573 (1956).

IV

CONCLUSION

These Railroads most respectfully submit that the issue in this case is one of the greatest economic and legal importance and that it therefore has the degree of substantiality that fully warrants and justifies an examination by this Court. Such examination will not only be of the greatest long range benefit to the regulated transportation industry of this nation, but of at least equally long range benefit to the courts and the administrative agency which, from time to time in the future, will be called upon to interpret Section 203(b)(6) of the Interstate Commerce Act. It is therefore, most respectfully submitted that this is a case where probable jurisdiction should be noted and the matter assigned for oral argument.

Respectfully submitted,

JAMES W. NISBET
CHARLES P. REYNOLDS
CARL HELMETAG, JR.
Attorneys for the Class I Railroads.

Certificate of Service

I, Carl Helmetag, Jr., Attorney for the Railroads, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing brief of the Railroads upon the several parties to this action as follows:

1. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, with postage prepaid to its Attorney, the Honorable Robert W. Ginnane, Interstate Commerce Commission, Washington 25, D. C.

2. On the Appellee, Home Transfer and Storage Co., Inc., by mailing a copy in a duly addressed envelope with air mail postage prepaid to its Attorney, John M. Hickson, Esquire, Yeon Building, Portland, Oregon.

This 29th day of August, 1956

CARL HELMETAG, JR.

APPENDIX "A"

LIST OF CLASS I RAILROADS

Akron, Canton and Youngstown Railroad Company
The Ann Arbor Railroad Company
The Atchison, Topeka & Santa Fe Railway Company
Atlantic Coast Line Railroad Company
The Baltimore & Ohio Railroad Company
Bangor and Aroostook Railroad Company
Boston and Maine Railroad
The Central Railroad Company of New Jersey
Chicago & Illinois Midland Railway Company
Chicago and Northwestern Railway Company
Chicago, Burlington & Quincy Railroad Company
Chicago, Great Western Railway Company
Chicago, Indianapolis and Louisville Railway Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, Rock Island and Pacific Railroad Company
The Delaware and Hudson Railroad
The Delaware, Lackawanna and Western Railroad Company
The Denver and Rio Grande Western Railroad Company
The Detroit and Toledo Shore Line Railroad Company
Detroit, Toledo and Ironton Railroad Company
Duluth, South Shore and Atlantic Railway Company (P. L. Solether, Trustee)
Elgin, Joliet and Eastern Railway Company
Erie Railroad
Florida East Coast Railway Company (John W. Martin, Trustee)
Fort Dodge, Des Moines & Southern Railway Company
Grand Trunk Railway System
Great Northern Railway Company
Green Bay & Western Railroad Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company

ıe Kansas City Southern Railway Company
high and New England Railroad Company
high Valley Railroad Company
ıine Central Railroad Company
dland Valley Railroad Company
ıe Minneapolis & St. Louis Railway Company
ınneapolis, St. Paul & Sault Ste. Marie Railroad Company
ıssouri-Kansas-Texas Railroad Company
issouri Pacific Railroad Company
ew York Central System
ıe New York, Chicago & St. Louis Railroad Company
ıe New York, New Haven & Hartford Railroad Company
ew York, Ontario and Western Railway
ew York, Susquehanna and Western Railroad Company
rfolk and Western Railway
rthern Pacific Railway Company
ıe Pennsylvania Railroad Company
ıe Pittsburgh and West Virginia Railway Company
ading Company
. Louis-San Francisco Railway Company
. Louis Southern Railway Company
aboard Air Line Railroad Company
uthern Railway Company
uthern Pacific Company
ıe Texas and Pacific Railway Company
ledo, Peoria & Western Railroad
ion Pacific Railroad Company
ıe Virginian Railway Company
abash Railroad Company
estern Maryland Railway
ıe Western Pacific Railroad Company.

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No. 365

IN THE

Supreme Court of the United States

October Term 1956

INTERSTATE COMMERCE COMMISSION, *Appellant*,

v.

HOME TRANSFER & STORAGE CO., INC., *Appellee*.

On Appeal From the United States District Court for the Western District of Washington, Northern Division

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BRIEF
of American Trucking Associations, Inc., *Amicus Curiae*

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INDEX

PAGE

Interest of ATA 2

Argument 3

Frozen fruits and vegetables are big business 3
The regulated trucking industry has a big stake in the frozen foods traffic 4
For-hire trucking is comprehensively regulated 5
Commission regulation extends to carriers of frozen fruits and vegetables 7
Regulated trucking stands ready to meet the frozen food industry's needs 10
Frozen fruits and vegetables are processed so as to become non-exempt 15
The "continuing substantial identity" test ignores the statutory language 16
Regulated trucking provides dependable and low-cost transportation 18

Conclusion 23

Certificate of Service 26

Appendix A 27

Table of Citations

Court cases

American Trucking Ass'ns. v. *United States,* 344 U. S. 298 6
Castle v. *Hayes Freight Lines,* 348 U. S. 61 5
East Texas Motor Freight Lines v. *Frozen Food Express,* 351 U. S. 49 ..... 15, 16, 17, 18, 19, 24
Fleming v. *Mohawk Wrecking & Lumber Co.,* 331 U. S. 111 10
Frozen Food Express v. *United States,* 351 U. S. 40 ..... 5, 6
Home Transfer & Storage Co. v. *United States,* 141 F. Supp. 599 1

PAGE

Interstate Commerce Commission v. *Love*, 77 F. Supp. 63 ..... 17, 18
United States v. *Jackson*, 280 U. S. 183 10

Commission cases

Determination of Exempted Agricultural Commodities, 52 M.C.C. 511 ..... 8, 10
Home Transfer & Storage Co. Investigation of Operations, 63 M.C.C. 785 9
Lease and Interchange of Vehicles by Motor Carrier, 51 M.C.C. 461 22
Needham's Motor Service, Inc. v. *Casperaites*, 44 M.C.C. 604 13
Newton Extension of Operations—Frozen Foods, 43 M.C.C. 787 ..... 7, 9
Northern Transp. & Supply Co. Common Carrier Application, 49 M.C.C. 199 12

Miscellaneous

Aluminum Company of America, *Refrigeration in Trucks and Trailers* 4, 5
American Trucking Associations, *American Trucking Trends* 5, 21
Interstate Commerce Commission, *Survey of Class I Motor Carriers of Property, 1939-1954* 12
Jurisdictional Statement 4, 12
National Association of Frozen Food Packers, *Frozen Food Pack Statistics, 1955* 3
Rocky Mountain Motor Tariff Bureau Eastbound Transcontinental Commodity Tariff No. 26 20
Transport Topics 14
U. S. Department of Commerce, *Current Population Reports* 3
U. S. Department of Agriculture, *Agricultural Statistics 1954* 16

PAGE

U. S. Department of Agriculture, *Agricultural Statistics 1955* 3
U. S. Department of Agriculture, *Marketing, The Yearbook of Agriculture, 1954* 19, 20
U. S. Department of Agriculture, *The Marketing and Transportation Situation* 19
U. S. Department of Agriculture, *Transportation of Florida Frozen Orange Juice Concentrate* 4, 11, 12

Statutes

Interstate Commerce Act
Sections 202(a), 206(a), 207(a), 208(a), 209 (a) and 209(b) 5
Section 203(b)(6) 2, 6, 8, 9, 14, 15, 16, 17, 18, 22, 23, 24, 25
Sections 204, 215, 216(b), 216(e), 217(a), 218(a) and 218(b) 6
National Transportation Policy 23

No. 365

IN THE

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INTERSTATE COMMERCE COMMISSION, *Appellant*,

v.

HOME TRANSFER & STORAGE CO., INC., *Appellee*.

On Appeal From the United States District Court for the Western District of Washington, Northern Division

BRIEF
of American Trucking Associations, Inc., *Amicus Curiae*

Comes now American Trucking Associations, Inc., *amicus curiae*,[1] and pursuant to Rule 42 of the Revised Rules of this Court respectfully submits this, its brief in support of the jurisdictional statement of the Interstate Commerce Commission on appeal from the decision of the United States District Court for the Western District of Washington, Northern Division, in *Home Transfer & Storage Co.* v. *United States of America and Interstate Commerce Commission*, 141 F. Supp. 599.

[1] A stipulation by the parties to this proceeding consenting to the submission of this brief, *amicus curiae*, has been filed with the Clerk of this Court and is reproduced herein as Appendix A.

INTEREST OF A.T.A.

American Trucking Associations, Inc., hereinafter called A.T.A., is the national organization of the trucking industry, representing all types of motor carriers of property. A non-profit corporation organized and existing under the laws of the District of Columbia, A.T.A. maintains offices at 1424 Sixteenth Street, N. W., Washington 6, D. C.

Many Commission-regulated motor carriers affiliated with A.T.A. having secured, at considerable expense, the necessary Commission authority as well as the required refrigerated vehicles, are presently engaged in the transportation of frozen fruits and vegetables. Through an industry group, the A.T.A. Committee on the Transportation of Perishables by Motor Truck, they have been conscientiously cooperating with frozen food packers and distributors to assure that they will have the quantity and quality of truck service necessary for the efficient and economical marketing of these frozen food products.

The decision of the lower court that frozen fruits and vegetables fall within the scope of the exemption of Section 203(b)(6) of the Interstate Commerce Act, 49 U.S.C. § 303(b)(6), and, therefore, that they can be transported by truck operators relieved by the exemption of economic regulation by the Commission renders doubtful the ability of the regulated trucking industry to continue to participate in this traffic. By that decision, unless reversed by this Court, the substantial investment of the regulated carriers in franchise and equipment will have been jeopardized, and their ability to recoup the cost of their research and development activities, largely destroyed. To clarify this matter the A.T.A. Executive Committee, at its meeting in Washington, D. C., on June 20 and 21, 1956, voted to support the Commission in its appeal from the lower court's decision, and this brief is filed in response to that direction.

ARGUMENT

Frozen Fruits and Vegetables Are Big Business.

A revolution in food processing has been wrought within the last two decades with the result that the American housewife now purchases approximately $2 billion worth of frozen fruits, vegetables and juices annually.

Civilian per capita consumption of frozen fruits alone increased more than threefold from 2.3 pounds in 1945 to 7.3 pounds in 1954, the last year for which figures are available. U. S. Department of Agriculture, *Agricultural Statistics 1955,* Washington, D. C., 1955, p. 197. Civilian per capita consumption of frozen vegetables during that same period jumped from 1.9 pounds to 5.9 pounds. *Id.,* p. 253. This phenomenal increase in the per capita consumption of frozen fruits and vegetables assumes even greater proportions when it is viewed in the light of the civilian population growth from 127,573,000 to 159,084,000—an increase of 31,511,000 during that same ten-year interval. U. S. Department of Commerce, *Current Population Reports,* series P 25, Nos. 71 and 105, Washington, D. C., 1955.

The production figures, of course, reflect this increasing consumer preference for frozen fruits and vegetables. The total frozen fruit pack for the United States rose from 194,643,000 pounds in 1942 to 659,787,000 pounds in 1955. National Association of Frozen Food Packers, *Frozen Food Pack Statistics: 1955,* Washington, D. C., 1956, Part 1, p. 4. For those same years the frozen vegetable pack totaled 152,512,000 pounds and 1,139,695,000 pounds, respectively, representing a tenfold increase within a period of less than fifteen years. *Id.,* Part 2, p. 4.

The Regulated Trucking Industry Has a Big Stake in the Frozen Foods Traffic.

Our concern, therefore, is with close to one million tons of freight annually, a substantial proportion of which moves in interstate commerce in the trucks of the regulated trucking industry. Just what percentage of the frozen fruits and vegetables traffic is transported by truck, regulated or otherwise, no one can say with any degree of certainty. However, one source has estimated that motor vehicles are used to transport 72 percent of the output of commercial frozen food. Aluminum Company of America, *Refrigeration in Trucks and Trailers,* Pittsburgh, Pa., 1956, p. 6. The Commission's estimate is more conservative. Jurisdictional Statement, p. 12.

The regulated trucking industry has made a significant investment in refrigerated vehicular equipment capable of transporting frozen foods. The estimated refrigerated truck and trailer population of the United States is said to be 195,000 units. Aluminum Company of America, *Refrigeration in Trucks and Trailers,* Pittsburgh, Pa., 1956, p. 2. Approximately 15 percent, or 29,400, of these are semi-trailers, *id.,* the type of vehicle that ordinarily would be employed by a Commission-franchised carrier in transporting frozen foods.

The cost of an adequately refrigerated and insulated semi-trailer is substantial. It depends upon the make, the construction, and the number of units purchased at one time. During the 1952-1953 season a 30-foot stainless steel or aluminum tandem-axle semi-trailer unit, equipped with heavy-duty mechanical refrigeration and six inches of insulation, cost the purchaser upwards of $10,000. A complete hauling unit—power unit and semi-trailer—cost $18,000 to $20,000, again depending upon the make and other factors. U. S. Department of Agriculture, *Transportation of Florida Frozen Orange Juice*

Concentrate, Washington, D. C. 1955, p. 23. Accepting these figures and disregarding the increase in costs and trend towards larger trailers since 1953, the trucking industry has an investment of approximately $300 million in refrigerated semi-trailers. On the basis of the national average for inter-city carriers of 1.64 semi-trailers per power unit, American Trucking Associations, *American Trucking Trends,* Washington, D. C., 1956, p. 21, this would represent a trucking industry investment in refrigerated tractor-semi-trailer combinations of about $475 million.

For-Hire Trucking Is Comprehensively Regulated.

Two out of every three refrigerated trailers (63%) are owned by common and contract carriers. Aluminum Company of America, *Refrigeration in Trucks and Trailers,* Pittsburgh, Pa., 1956, p. 4. If engaged in interstate operations, such common and contract carriers by motor vehicle are subject to the provisions of Part II of the Interstate Commerce Act. 49 U.S.C. § 302(a). In enacting Part II the Congress adopted a comprehensive plan for regulating interstate truck transportation. *Castle* v. *Hayes Freight Lines,* 348 U. S. 61, 63, 75 S. Ct. 191, 192. That part grants the Commission pervasive control over motor carriers. *Frozen Food Express* v. *United States,* 351 U. S. 40, 41, 76 S. Ct. 569. Common carriers by motor vehicle, subject to Part II of the Act, must have certificates of public convenience and necessity authorizing their operations, 49 U.S.C. § 306(a), and contract carriers must have permits. 49 U.S.C. § 309(a). The certificate, issued after a showing of fitness and ability to perform and a public need for the proffered service, 49 U.S.C. § 307(a), specifies the routes and terminii that may be served. 49 U.S.C. § 308(a). The permit specifically defines the scope and business of the permitted operations. 49 U.S.C. § 309(b). Certificated common

carriers are required to render adequate service and maintain just and reasonable rates, 49 U.S.C. § 316(b), which rates must be published in tariffs available to the public, 49 U.S.C. § 317(a), and, upon complaint or on its own motion, the Commission may prescribe and order the publication of such rates as in its judgment are just and reasonable. 49 U.S.C. § 316(e). Contract carriers must maintain reasonable minimum rates and file with the Commission schedules setting forth those minimum rates, 49 U.S.C. § 318(a), and the Commission, if necessary, may prescribe what it deems to be just and reasonable minimum rates. 49 U.S.C. § 318(b). Both common and contract carriers must adhere to Commission-prescribed insurance requirements. 49 U.S.C. § 315.

These requirements of economic regulation are not applicable, however, to "motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation." 49 U.S.C. § 303(b)(6). See *Frozen Food Express* v. *United States, supra,* at 351 U. S. 41, 76 S. Ct. 570. The equipment in this argricultural exemption category falls only within the Commission's jurisdiction over drivers' qualifications, hours of service and safety of operations and equipment. 49 U.S.C. § 304. And so there is no mandate on these unregulated truck operators to provide adequate and nondiscriminatory service, adhere to published rates and comply with the strict insurance requirements imposed on carriers authorized for general carriage. *American Trucking Ass'ns.* v. *United States,* 344 U. S. 298, 302, 73 S. Ct. 307, 311.

Commission Regulation Extends to Carriers of Frozen Fruits and Vegetables.

Until the decision of the U. S. District Court for the Western District of Washington, appealed from herein, was rendered, there had been no question that frozen fruits and vegetables lay beyond the scope of the agricultural exemption. The Commission first found frozen fruits and vegetables to be non-exempt agricultural products in 1944 in *Newton Extension of Operations—Frozen Foods,* 43 M.C.C. 787, 788, wherein the Commission, division 5, said:

> Fresh frozen fruits and vegetables, as described in this record, are of relatively recent appearance on the market. The fresh agricultural commodities from which they are prepared are brought directly from the farm, or producer, in their natural unprocessed state, to the nearest freezing plant. They are frozen either in an ice manufacturing plant under contract or in the special plant of a company in this new industry. Here the raw produce is variously sorted, graded, washed, sliced, compressed, frozen, packed, and packaged in paraffin cartons, depending on the particular fruit or vegetable and the particular refinements of the processing company. This process retains to a great degree the original fresh flavor of the article, and retains the greatest amount of vitamins. Intense cold is used in freezing, and thereafter the frozen product must be continuously kept in subfreezing temperature until ready for actual consumption. In transportation, ordinary refrigeration will not suffice, a constant temperature of 15 degrees Fahrenheit, or below, usually with dry ice (solid carbon dioxide gas), being necessary. One consignee of the frozen products specifies by contract with the carrier a temperature of 5 degrees or under. Foods so processed are termed frozen or frosted, interchangeably. It is not practicable to refreeze any of this food which has been accidentally thawed or defrosted in transit. It is clear that agricultural commodities, frozen in the manner hereinabove described,

> are subjected to a process of manufacture, and that the finished products are as distinct from agricultural commodities as are canned fruits and vegetables, from which both are manufactured. Fresh frozen goods are also distinguishable from foods merely under refrigeration, such as peaches, watermelons, et cetera, in that they are never prepared by the producer of the agricultural commodities from which made, are packaged, and preserved goods sold under trade brands, and can be placed in cold storage for long periods of time. We conclude that fresh frozen fruits and vegetables are "manufactured products" as that term is used in section 203(b)(6) of the act, and that the transportation of such commodities is subject to the certificate or permit requirements of part II of the act.

Subsequently, in its definitive investigation concerning the meaning of the term "agricultural commodities (not including manufactured products thereof)" as used in Section 203(b)(6), *Determination of Exempted Agricultural Commodities*, 52 M.C.C. 511, 534, the Commission, in conformity with the testimony of the expert witnesses offered by the Secretary of Agriculture of the United States, found:

> Although no one questions the examiner's conclusion that frozen or quick-frozen fruits and vegetables are manufactured products, in view of certain questions raised respecting other frozen commodities, some discussion of these items will be helpful. The quick freezing of fruits involves the addition of other ingredients, principally sugar or sirup. Since a "combination" results, it follows in light of the foregoing definition of "manufacture" that quick-frozen fruits are manufactured products. In the quick freezing of vegetables, the commodities are customarily blanched or scalded prior to freezing, and sometimes ascorbic acid is added, thus enabling the product to be held in that condition until ready for use. In the circumstances, the frozen vegetables cannot be said to be in their natural state. We conclude that they, too, are manufactured products.

Again, in the Commission proceeding antecedent to the instant case, *Home Transfer & Storage Co. Investigation of Operations,* 63 M.C.C. 785, 787, the Commission held that the transportation of frozen fruits and vegetables is not within the exemption provided by Section 203(b)(6). The report of the Joint Board adopted by the Commission, division 5, found:

> There was considerable testimony bearing on the processing of fresh fruits and vegetables at the plant located in Mount Vernon. The processing of fresh peas is typical of the quick freezing of vegetables, although individual steps in the process or the order in which they occur depend upon the kind of vegetable to be frozen. The peas are removed from the pods at a "viner" located near the harvest area. They are then transported to the plant where they are put through dry mills to remove debris and through water washers. The peas then are subjected to a "blanching" process by which quick heat is applied for the purpose of inactivating the enzymatic system of the vegetable. If the enzymes are permitted to remain active, the vegetable will spoil even in cold storage. Thereafter, the peas go through quality separators, over inspection belts, thence onto freezing belts where they are loose frozen by blasts of cold air. They are then packaged, cased, and placed in a cold warehouse. Typical of the fruits are raspberries which are washed and put into packages. Sirup is added, the package is closed, and the entire unit is frozen. In addition to providing sweetening, the sirup also acts as an antioxident in maintaining the color of the fruit. Once frozen, the fruits and vegetables must be kept at temperatures near zero. While temperatures as high as 15° F. may not be harmful, it is important that variations in temperature be avoided to protect against deterioration in quality. 63 M.C.C. 789-790.

Thus throughout a period of more than ten years, from the 1944 decision in the *Newton* case to the 1955 decision in the *Home* case, the Commission adhered to its conclu-

sion based upon findings supported by the evidence in no fewer than three separate proceedings that frozen fruits and vegetables were beyond the scope of the exemption of Section 203(b)(6). Such consistent construction of the statute by the agency charged with its administration properly should be given great weight. *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 116, 67 S. Ct. 1129, 1132; *United States* v. *Jackson*, 280 U. S. 183, 193, 50 S. Ct. 143, 146.

The Commission's classification of frozen fruits and vegetables as non-exempt agricultural products remained unchallenged until the instant judicial proceeding was begun. Since then, and largely as a result of the lower court's decision herein, the matter has been injected into the litigation before the U. S. District Court for the Southern District of Texas docketed as Civil Action No. 8285, *Frozen Food Express, et al.* v. *United States, et al.* That case involves a comprehensive review of the agricultural exemption and presents a direct challenge of the Commission's order in the all-embracing *Determination* case. The decision remains pending and, when rendered, may well be brought to this Court on appeal.

Regulated Trucking Stands Ready to Meet the Frozen Food Industry's Needs.

It was during this same ten-year period covered by the Commission's decisions that production and consumption of frozen fruits and vegetables made their greatest strides. And it was *regulated* truck transportation that facilitated that growth, for quite obviously only certificated or permitted carriers could lawfully participate in the interstate, for-hire transportation of frozen fruits and vegetables. Regulated motor carriers were alert to the challenge of the growing frozen foods industry and adequately met that challenge—in equipment, in service and in rates.

The dramatic story of how regulated truck transportation met the needs of one segment of the frozen food industry, the infant frozen orange juice concentrate industry in Florida, has been capably told in a recent study by Miss Margaret Purcell, Transportation Economist in the Agricultural Marketing Service of the U. S. Department of Agriculture. In *Transportation of Florida Orange Juice Concentrate,* U. S. Department of Agriculture, Washington, D. C., 1955, Miss Purcell wrote:

> Because the concentrate output increased sharply beginning with the 1948-49 season . . . , processors urgently appealed for enough suitable transportation equipment to move the pack. Their appeals were for trailers equipped with at least 6 inches of insulation and mechanical refrigeration which would maintain 0° F. Encouraged by the producers, many motor carriers filed application with the ICC for authority to haul the new product. Obtaining such authority is frequently expensive and time-consuming. However, because of the obviously urgent need for transportation, several applicants were granted temporary operating permits by the Commission. Subsequently, in accordance with established procedure, hearings on carrier applications for permanent authority were conducted by Commission examiners at various points within the production and distribution areas. . .
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> . . . this brought to six in the 1952-53 season the number of interstate motor carriers holding permanent certificates permitting them to transport concentrate from certain Florida plants or storage points to certain northern destinations. They all operated as common carriers over irregular routes—five as special commodity carriers, and one as a general commodity carrier. One also had additional authority to operate as a common carrier over regular routes. One of the six had pending three additional applications for permanent authority to haul concentrate from and to points not included in his existing permanent authority, and another had one additional

application pending. As a group, the six carriers owned approximately 300 refrigerated trailer units. . .

During a portion of the 1952-53 season, four interstate carriers held temporary authority permitting them to operate as common carriers over irregular routes and to transport concentrate between specified origins and destinations. Three were carriers of special commodities, and one was a carrier of general commodities. Because of the ICC order referred to above, restricting the number of trailer units that could be operated under temporary permit, these four carriers were limited to the use of 125 suitably refrigerated units. [pp. 14-16.]

The story of the accommodation of the regulated trucking industry to the ever-increasing demands of the fruit and vegetable segment of the frozen food industry remains to be told in equal detail. Without doubt it will compare favorably with that which has been related in connection with the Florida frozen orange juice concentrate industry.

The Commission reports that 60 Class I carriers, carriers grossing $200,000 or more annually, already are engaged exclusively in the transportation of refrigerated solid products, and another 372 transport such goods in addition to other freight. Their earnings from the transportation of this refrigerated freight approximate $240 million a year. Jurisdictional Statement, p. 13. Altogether there are more than 1,100 Class I common carriers of general commodities, Interstate Commerce Commission, *Survey of Class I Motor Carriers of Property, 1939-1954*, Washington, D. C., 1956, p. 4, ready, under appropriate conditions, to serve the frozen fruit and vegetable trade. They require no further Commission authority before commencing the transportation, for the Commission has ruled that the authority to transport general commodities includes the right to transport commodities which require refrigeration. *Northern Transp. & Supply Co. Common*

Carrier Application, 49 M.C.C. 199, 202; *Needham's Motor Service, Inc.* v. *Casperaites,* 44 M.C.C. 604, 607. Carriers presently or potentially engaged in refrigerated truck transportation are entitled to the assurance that, if they do expand their operations and make the investments in refrigerated facilities needed to handle the growing frozen fruits and vegetables traffic, their expenditures will not be jeopardized by the cut-throat competition of unregulated truck operators. This Court's reversal of the decision of the lower court and the continued recognition of frozen fruits and vegetables as non-exempt agricultural products will give them that assurance.

The regulated motor carrier industry recognizes that there is a legitimate place for unregulated truck operators in the marketing of agricultural produce. Just as the migratory farm workers are necessary for the seasonal harvesting of fruit and vegetable crops in areas of intensive production, so the itinerant trucks are needed to transport those crops to packing houses, processing plants and marketing centers. As the field laborers move in great numbers from Florida up the East Coast, from the Rio Grande Valley through the Middle West and into Canada and from California to the great fruit producing areas of the Pacific Northwest so a supply of owner-operated vehicles must be available to absorb the seasonal impact inherent in the production of fresh fruits and vegetables.

As the trucking industry has evolved under regulation, this seasonal demand for truck transportation of raw produce admittedly cannot be met as well by regulated carriers. The regularity of their operations is such that they cannot readily absorb the peaks and valleys of seasonal crop production. As a matter of fact they probably would eschew the responsibility of having to serve adequately the shippers and receivers of fresh fruits and

vegetables, and hence they heartily endorse the continued use of the exemption of Section 203(b)(6) as a means of permitting flexible truck transportation to be available to meet the seasonal needs of the agricultural community.

However, frozen fruits and vegetables do not move in seasonal spurts. Their transportation out of the packing plants and refrigerated warehouses proceeds at a substantially constant rate throughout the year, and hence there is no need for exempt truck transportation of these frozen products. On the contrary the constant supply of frozen foods traffic ideally lends itself to the regular operations of franchised motor carriers.

That the regulated motor carrier industry is interested in continuing, under regulation, its participation in the frozen foods traffic is demonstrated by the formation of the A.T.A. Committee on Transportation of Perishables by Motor Truck. The Committee was formed in November of last year, after months of exploratory talks, for the purpose of formulating standards of performance to insure maximum preservation of product quality in the transportation of frozen foods and other perishables. *Transport Topics,* National Newspaper of the Motor Freight Carriers, November 21, 1955, p. 11. Three subcommittees composed of officers of leading refrigerated carriers were appointed to promote higher standards for the transportation of refrigerated commodities, to provide equipment manufacturers with accurate information on the needs of the industry for improved equipment, and to strengthen the ties between motor carriers and shippers of frozen foods and other perishables. *Id.*

The Committee held a two-day meeting in January of this year to develop a simple, sound and practical testing procedure to determine the performance of refrigerated semi-trailers. *Transport Topics,* January 16, 1956, p. 82. Contacts were made with the Bureau of Standards

and the Department of Agriculture, as well as with the National Association of Frozen Food Packers and other trade groups, to implement this program. On April 23, 1956, this Court rendered its decision in *East Texas Motor Freight Lines* v. *Frozen Food Express,* 351 U. S. 49, 76 S. Ct. 574, that fresh and frozen dressed poultry could be transported by non-regulated motor carriers without Commission authority. Since then there has been considerable doubt among regulated carriers as to the future of transportation of perishable products generally and a consequent slow-down of activities looking toward the improvement of refrigerated equipment and attendant service pending the clarification of the status of the disputed commodities. On May 7, 1956, the worst fears of the regulated carriers were realized when the lower court herein, in mistaken reliance on this Court's decision in the *East Texas* case, held that the transportation of frozen fruits and vegetables was not subject to economic regulation by the Commission.

Frozen Fruits and Vegetables Are Processed So as to Become Non-Exempt.

It is submitted that the lower court erred in deeming any question as to the exempt status of frozen fruits and vegetables to be foreclosed by the decision of this Court in the *East Texas* case as to dressed poultry. Aside from obvious distinctions of different commodities and different Commission proceedings being involved in the two cases, it would seem that the treatment accorded the frozen fruits and vegetables herein is sufficient to remove them from the exemption of Section 203(b)(6) while this Court could find, as it did, that poultry that had merely been killed and eviscerated was exempt. 351 U. S. 54, 76 S. Ct. 577.

The record herein establishes, for example, that frozen french fried potatoes are peeled, inspected, sliced, washed,

deep fried, packaged and frozen. (T. 40.)[2] Cauliflower is cored, sliced, sectioned, washed, blanched, cooled, packaged and frozen. (T. 19.) Squash is washed, broken up, pureed or "cooked", finished, cooled, filled and frozen. (T. 52, 62.) As a matter of fact, all vegetables except rhubarb, to which sugar is added (T. 45), are blanched or scalded prior to freezing. (T. 13, 46.) The blanching process changes the chemical composition of the vegetables (T. 163) and inactivates the enzyme system. (T. 10.) Fruits are not blanched but sugar or syrup is added to such fruits as strawberries, raspberries and peaches. (T. 57, 180.) The sugar is not added merely for flavor but becomes a part of the frozen product. (T. 180.) In addition ascorbic acid is added to peaches. (T. 59.)

Surely fruits and vegetables which have been subjected to such processing have become non-exempt agricultural commodities within the meaning of Section 203(b)(6). This processing was not necessary to render the fruits and vegetables more "marketable", 351 U. S. 54, 76 S. Ct. 577; nearly 40 billion pounds of fresh fruits and vegetables, the transportation of which clearly is exempt from Commission regulation under Section 203(b)(6), are consumed annually without the benefit of such processing. U. S. Department of Agriculture, *Agricultural Statistics 1954*. Washington, D. C. 1954, pp. 200, 254. For these frozen fruits and vegetables, processing and manufacturing have merged, 351 U. S. 54, 76 S. Ct. 577; they are non-exempt.

The "Continuing Substantial Identity" Test Ignores the Statutory Language.

The lower court herein misinterpreted certain language of this Court in the *East Texas* case, 351 U. S. 54, 76

[2] Transcript references refer to the manuscript record of the hearings before the Joint Board.

S. Ct. 577, and fashioned therefrom a "continuing substantial identity" test for determining the scope of the exemption of Section 203(b)(6) to replace the statutory standard of "agricultural . . . commodities (not including manufactured products thereof)." Under that test an agricultural product retains its exempt status as long as it retains a "continuing substantial identity."

That a pea is still a pea when blanched and frozen begs the issue, and there can be no doubt that this Court laid down no such mechanistic criterion for determining the scope of the agricultural exemption of Section 203(b)(6) in the *East Texas* case. After all, even when canned, the pea continues to be a pea, but surely no one contends that canned peas should be deemed to be exempt under Section 203(b)(6); yet that result would have to be reached under the so-called "continuing substantial identity" test established by the court below.

The logical extension of the so-called "continuing substantial identity" test applied by the lower court herein would nullify the modifying words "not including manufactured products thereof" of the agricultural exemption and would place agricultural commodities on a par with ordinary livestock and fish which are not so modified in Section 203(b)(6). *Interstate Commerce Commission* v. *Love* 77 F. Supp. 63, 67, affirmed, 172 F. (2nd) 224. As a matter of fact, counsel for the appellee observed at the time of the hearing before the Joint Board that "there is practically no difference between the processing of fish, frozen fish, and frozen fruits and vegetables. Yet the Commission holds that frozen fish are not manufactured." (T. 145.) What counsel forgot was that the modifying clause "not including manufactured products thereof" applies to "agricultural . . . commodities" but not to ordinary livestock or fish.

As a result of the lower court's decision one wonders, naturally, what distinction remains as to the processing

that can be accorded fish, which is not subject to the modifying clause, that can not be accorded agricultural commodities, which are thusly modified. After all, the court in the *Love* case agreed that fish which had been canned was taken out of the exemption. 77 F. Supp. 67. Would the lower court herein have said as much if the issue of canned fruits and vegetables had been before it? It's application of the so-called "continuing substantial identity" test would indicate not. The statutory language "not including manufactured products thereof" would be ignored altogether.

We maintain that the lower court gave unwarranted extension to what was merely explanatory language of this Court in the *East Texas* case. It cannot be assumed that this Court would prescribe as an absolute criterion for ascertaining the exempt status of doubtful agricultural commodities a test which when carried to its logical conclusion would nullify the very statutory language of Section 203(b)(6). Certainly the question remains whether the commodity in question has been processed to the point of losing its exempt status under Section 203(b)(6). Here there can be no doubt that the fruits and vegetables have been so processed and have become "manufactured products" within the meaning of Section 203(b)(6).

Regulated Trucking Provides Dependable and Low-Cost Transportation.

On the other hand there can be no confusion as to the statement of this Court in the *East Texas* case that the agricultural exemption "was designed to preserve for the farmers the advantage of low-cost motor transportation." 351 U. S. 51, 76 S. Ct. 576. The trucking industry concurs in that conclusion and expresses its complete sympathy with the stated objective. It maintains, however, that in the instance of frozen fruits and vegetables, at least, the avowed purpose of aiding the farmer has been

achieved, and can continue to be achieved, by *regulated* for-hire truck transportation.

This Court continued in the *East Texas* case with the observation, as follows:

> The victory in the Congress for the exemption was recognition that the price which the farmer obtains for his products is greatly affected by the cost of transporting them to the consuming market in their raw state or after they have become marketable by incidental processing. 351 U. S. 51, 76 S. Ct. 576.

The cost of transportation, as awesome as it may be to the farmer, is a relatively small percentage of the farmer's total marketing bill—that important spread between what the consumer pays and what the farmer receives. Of the two, the marketing margin is of far greater significance to the farmer than the transportation factor alone. For frozen beans, for example, the marketing costs come to 80 percent of the retail price, leaving the farmer 4.6 cents out of a 23.2-cent package; the marketing costs of frozen peas are even greater—85 percent, and the farmer receives only 3.1 cents of a 21.3-cent package. U. S. Department of Agriculture, *The Marketing and Transportation Situation*, Washington, D. C., July 24, 1956, p. 29. Just how much of the marketing costs for specific items, as frozen beans and peas, is spent for transportation throughout the country is unknown. The Department of Agriculture estimates that overall transportation charges account for 10 percent of the marketing bill. U. S. Department of Agriculture, *Marketing, The Yearbook of Agriculture, 1954*, Washington, D. C., 1955, p. 15. It seems reasonable to assume that percentagewise transportation charges become less and less significant as the agricultural commodity is increasingly processed and the other marketing costs are correspondingly increased. This is confirmed by the Department of Agriculture in its observation, as follows:

> Processing is usually the most costly service for such products as bakery goods, evaporated milk, the prepared cereals, canned fruits and vegetables, and other highly processed products. For other farm products—fresh meat, poultry, eggs—for which processing is of less importance and transportation charges are relatively low, retailing is the most expensive operation. *Id.*

The current regulated common carrier rates on frozen fruits and vegetables would seem to bear this out. The commodity rate on cold pack or frozen berries, fruits and vegetables from Portland, Oregon, and related points to Chicago, Illinois, and related points, for example, is $2.56 per 100 pounds, minimum weight of 28,000 pounds. Item 8785, Rocky Mountain Motor Tariff Bureau Eastbound Transcontinental Commodity Tariff No. 26, MF-ICC No. 81. That rate permits a representative 10-ounce package of frozen fruits or vegetables to move by regulated and refrigerated common carrier truck the 2,200 miles from one of the major producing areas to one of the major distribution areas for about a cent and a half per package. Compared with the average transportation charge of 10 percent of the marketing costs our package of frozen beans or peas traverses more than half the continent at a rate equal to about 8½ percent of the marketing charges. Low cost transportation for frozen fruits and vegetables, therefore, is available to the farmer under regulated motor transportation.

The motor common carrier rate on frozen fruits and vegetables is what is known as a "tight" rate. It covers the carrier's pro rata costs and little more. The competitive necessity of meeting railroad transcontinental carload rates has brought the motor-carrier tariff rate to the barest minimum consistent with prudent management. It is likely, therefore, that, even if frozen fruits and vegetables were declared to be exempt agricultural

commodities, no substantial reductions in transportation charges could result.

However, in the marketing of frozen fruits and vegetables a difference of just a few cents per hundred pounds would give the favored packer or wholesaler a tremendous advantage in disposing of his products. Frozen fruits and vegetables for the most part are fungible, and the arrival at a distribution point, such as Chicago, of several truckloads of these frozen foods offered at a slightly lower price than that prevailing would be sufficient to disrupt the entire market. The motor carriers who under the broadened exemption would be vying for the frozen fruit and vegetable traffic, therefore, would be under insuperable pressure to lower their rates, even if only a few cents per hundredweight. In a shipper-inspired rate war between the regulated carriers and the unregulated, the latter would be able to reduce its rates below any level that the former could justifiably meet—not because of any greater efficiencies in itinerant trucking but simply because of the inherent economies of unregulated owner-operations.

We do not believe it necessary to detail the economic burden of regulation imposed upon Commission-franchised motor carriers that the unregulated truck operators need not bear. To cite only one example, the cost of insurance required by the Commission of regulated carriers can be avoided by the exempt carriers. Approximately five cents out of every dollar of the gross revenue of Class I intercity common carriers of general freight is spent on insurance premiums, claims and other expenditures relative to insurance. American Trucking Associations, *American Trucking Trends,* Washington, D. C., 1956, p. 28. The avoidance of this expense alone would give the unregulated carriers a five percent advantage in competing with the regulated carriers for the frozen fruit and vegetable traffic, if that traffic were held to be exempt.

Evidence presented to the Commission in another proceeding revealed that of the individuals who are induced to become owner-operators through promises of large earnings, a large percentage soon lose their equipment. They often drive hours in excess of the Commission hours-of-service requirements, driving without adequate rest from 16 to 76 hours. In addition certain owner-operators practice such dubious economies as letting their equipment roll downhill in neutral gear in order to save gasoline, and some almost continuously overload their trailers. They may defer necessary repairs on their equipment and operate under hazardous weather conditions. *Lease and Interchange of Vehicles by Motor Carriers,* 51 M.C.C. 461, 480-481. Even where such practices are in direct violation of the Commission's safety regulations applicable to regulated and unregulated carriers alike, the Commission's inability to police the exempt truck operators because of the itinerant nature of their transportation activities has the effect of casting the economic burden of compliance upon the franchised carriers alone.

It is no answer, therefore, to suggest that, if frozen fruits and vegetables are held by this Court to be within the scope of the exemption of Section 203(b)(6), the regulated carriers will be able to transport them in vehicles exempt from economic regulation just as the itinerant trucker does. An established carrier having to maintain a sizeable fleet of well-equipped vehicles, a continuing payroll that reflects the terms of a union wage agreement and expensive terminal facilities adapted to the normal demands of traffic just cannot hope to match the rate offered by an owner-operator who lives and sleeps in the vehicle he drives, who is paying for it on time and who'll charge whatever it takes for him to get a load to keep that vehicle moving.

Unregulated truck transportation, characterized by the constant turnover of itinerant operators who go broke after six or nine months, may supply the flexible and cheap transportation necessary for the seasonal marketing of fresh agricultural produce; however, it makes little contribution towards the establishment of a sound national transportation system. The National Transportation Policy, 49 U.S.C. preceding § 1, directs the Commission to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation among the several carriers, and to encourage the establishment and maintenance of reasonable charges for transportation services without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices. Perhaps the greatest threat to the Commission's carrying out of these directives is the unwarranted and unwise judicial expansion of the agricultural exemption of Section 203(b)(6).

CONCLUSION

The regulated trucking industry has played a vital role in the phenomenal growth of the frozen foods industry within the past two decades. Without exaggeration it can be said that but for truck transportation frozen foods probably never would have reached the housewife's table; if nothing else, a refrigerated truck brought the packages of frozen foods to her grocer's door.

The instant case, however, involves the for-hire truck transportation of frozen fruits and vegetables in interstate commerce, predominantly from the producer to the warehouseman or from the warehouseman to the distributor. Under the decisions of the Interstate Commerce Commission such transportation has had to be performed by motor carriers operating pursuant to Commission-issued certificates of public convenience and necessity or

permits and subject to Commission regulation as to rates, service and insurance. Regulated motor carriers have kept pace with the needs of the frozen fruit and vegetable trade and have freely made the expenditures of time, effort and funds to obtain the franchises and the equipment so as adequately and efficiently to serve the industry. At the same time, regulated carriers have rendered refrigerated service at reasonable rates which have permitted the free movement by truck of the frozen fruit and vegetable pack.

The sole question presented to this Court by the instant appeal, as a practical matter, is whether regulated motor carriers should be permitted to continue to participate in this traffic. The question is substantial. It involves a movement of some one million tons of freight per year and a fleet of refrigerated inter-city vehicles representing invested capital of approximately $475 million. The regulated carriers desire to continue to haul frozen fruits and vegetables, but they cannot do so if they must encounter the untrammeled competition of unregulated truck operators.

The lower court herein held that frozen fruits and vegetables are exempt agricultural commodities within the meaning of Section 203(b)(6) and that, therefore, motor carriers having no Commission authority and free from Commission regulation can transport such freight. The court did this in the mistaken belief that this Court in the *East Texas* case laid down a "continuing substantial identity" test for determining the exempt status of questioned commodities. Such test, however, would disregard the statutory language, which after all is the primary determinant of the scope of the exemption of Section 203(b)(6). It is clear that frozen fruits and vegetables have been processed further than merely to render the fruits and vegetables marketable. Processing

and manufacturing have merged, and the transportation of such frozen fruits and vegetables is beyond the scope of the exemption of Section 203(b)(6).

Wherefore this Court should note probable jurisdiction herein and should reverse the decision of the District Court for the Western District of Washington.

Respectfully submitted,

AMERICAN TRUCKING ASSOCIATIONS, INC.

PETER T. BEARDSLEY
FRITZ R. KAHN
Attorneys

CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for American Trucking Associations, Inc., and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 28th day of September, 1956, I served copies of the foregoing document on the several parties hereto, as follows:

1. On the United States, by mailing a copy thereof in a duly addressed envelope, with airmail postage prepaid, to Charles P. Moriarty, United States Attorney, and Edward J. McCormick, Jr., Assistant United States Attorney, Seattle, Washington, and by mailing a copy in a duly addressed envelope, with postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, with postage prepaid, to Robert W. Ginnane, General Counsel, and Leo H. Pou, Associate General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On Home Transfer and Storage Co., by mailing a copy thereof in a duly addressed envelope, with airmail postage prepaid, to John M. Hickson, Esq., Yeon Building, Portland, Oregon, and another copy thereof in a duly addressed envelope, with airmail postage prepaid, to Ruben C. Youngquist, Esq., Mt. Vernon, Washington.

PETER T. BEARDSLEY

APPENDIX A

IN THE
SUPREME COURT OF THE UNITED STATES

No. 365

INTERSTATE COMMERCE COMMISSION, *Appellant,*

v.

HOME TRANSFER AND STORAGE CO., INC., *Appellees*

STIPULATION

It is hereby stipulated by the parties to this action that, in accordance with Rule 42 of the Rules of the Supreme Court of the United States, American Trucking Associations, Inc., may file brief *amicus curiae,* in this action.

/s/ OSCAR H. DAVIS
Acting Solicitor General

/s/ ROBERT W. GINNANE
ROBERT W. GINNANE,
General Counsel, Interstate Commerce Commission

/s/ JOHN M. HICKSON
JOHN M. HICKSON
Attorney for Appellee.